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THE COURT AND THE CONSTITUTION, by
Owen J. Roberts. Harvard University Press,
Cambridge, 1951. Pp. 102. \$2.00.

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to his advanced age. To these I strongly recommend a prayerful reading of Cicero's *De Senectute*—particularly chapters six and seven with the quotation from the poet, Naevius.

E. M. Morgan*

THE COURT AND THE CONSTITUTION, by Owen J. Roberts. Harvard University Press, Cambridge, 1951. Pp. 102. \$2.00.

Whatever Justice Roberts has to say about the Supreme Court is to be heard with attention, because of who he is and of what he has been. The little volume here reviewed preserves his Holmes Lectures for 1951.¹

In our dual form of government it belongs to the Court to pass upon "the alleged transgressions by one government upon the authority of the other." In performing this function the Court has been obliged "to announce propositions nowhere expressly stated in the Constitution."² How wise has been its work in this regard? That is the framework of the lectures. Three fields are considered: taxation, regulation, and due process.

Marshall, as we now see it, got us off to a bad start in that portion of *McCulloch v. Maryland* wherein he analyzed the problem of federal immunity from state taxation. Thereafter the history of intergovernmental immunities abounds in shifting doctrine, and in exorbitant exemptions. "Most of the immunities so carefully built up on *McCulloch v. Maryland* have subsequently been swept away. In any practical view of the subject, more should go,"³ is the conclusion. "My own view is that the steady progress toward abolition of the reciprocal immunities has been beneficial."⁴

Chapter II deals with Conflicts of Police Power—a consideration chiefly of commerce clause law, but also of the congressional power to regulate by taxing and spending. In the argument of the AAA case, *United States v. Butler*,⁵ Justice Roberts recalls, "The government disavowed any support for the statute under the commerce power." "The exaction was

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1. A prefatory note records that Justice Holmes left a legacy for the Harvard Law School, the income whereof is "devoted to paying the honorarium of a lecturer to be known as the Holmes Lecturer," an appointment made "not oftener than once in three years."

2. P. 2.

3. P. 32.

4. P. 35.

5. 297 U.S. 1 (1936).

held not to be a true tax.”⁶ Here, as elsewhere in recording the past of which he was a part, Justice Roberts is studiously impersonal. He writes merely as one who has studied the reports. (He does, however, cast numerous votes on issues arising after his resignation.) His conclusion is that “The continual expansion of federal power with consequent contraction of state powers probably has been inevitable. . . . Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy.”⁷

Chapter III, The Fourteenth Amendment, deals with the most active of the topics, and offers the most noteworthy comments. Justice Roberts makes it clear that he would not join with those who read the Amendment as incorporating the entirety of the first eight Amendments.⁸ Nor does he take his stand with those who accept as the logic of history that the due process clause should be construed to safeguard those values found to be “implicit in the concept of ordered liberty.”⁹ Rather he employs the method of textual analysis: when the Fourteenth Amendment was drafted, one clause from the federal bill of rights was repeated and the others were ignored. Time and again the Court has been urged to accord due process in the Fourteenth Amendment a broader, more inclusive meaning than in the Fifth, and often it has done so. Of *Gitlow v. New York*,¹⁰ wherein it was conceded that freedom of speech is to be included within the “liberty” of the Fourteenth Amendment, Justice Roberts says, “This decision was the most sweeping judicial extension of federal power over state action in the history of the republic.”¹¹

Proceeding by the method of strictly logical construction—due process in the Fourteenth Amendment means what it does in the Fifth, and necessarily excludes all other guaranties enumerated in the federal bill of rights—Justice Roberts comes to the field of state criminal procedure, and finds much to criticize in some of the holdings of the Court. But perhaps one may urge that here wise judicial statesmanship calls for something more than formal logic, and that the difficulty is inherent in the recon-

6. P. 47.

7. P. 61.

8. P. 74.

9. See Cardozo, J., in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

10. 268 U.S. 652 (1925).

11. P. 73.

ciliation of two high values—conceding to each state the responsibility for working out the quality of its justice, while yet assuring to the individual at least the essentials of fair treatment, albeit not the particular guaranties enumerated in Amendments One to Eight.

The reviewer closed the book with the thought that, interesting and important as are all of the comments, the most significant reflection is suggested rather than expressed in the text. Every position is advanced accurately and defended with effective strokes—one recalls the author's strength when an advocate at the bar. The present state of constitutional development is marked, sometimes with a certain note of resignation but never with the accent of despair. There have throughout our history been patriots whose attachment to their own opinions was more assured than their faith in the American nation. Justice Roberts is not of their number. He is never one to spread alarm even though at some points his views may not prevail. One knows that, like the justice to whose memory the lectures did honor, Justice Roberts has faith that the future may be greater than the thought of even the wisest of patriots.

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MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE, by Joel Francis Paschal. Princeton University Press, Princeton, 1951. Pp. xii, 267. \$4.00.

As the author, himself, recognizes, this is not conventional biography. Indeed, it is scarcely biography at all. No clear-cut picture of Mr. Justice Sutherland as an individual human being emerges from these pages. Information with reference even to the basic milestones of his career is sparingly offered. Mr. Paschal, rather, has devoted himself to the study of the acquisition and application by Sutherland of a theory of government. Within these limitations—and perhaps, in part, because of them—the author has produced a valuable, if not particularly engaging, work.

It is Mr. Paschal's thesis that Sutherland, largely as a result of his formal education under men like Cooley and Campbell at the Michigan Law School and his early professional associations at the bar, was profoundly influenced in his intellectual develop-

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